

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

03-CR-6142L

v.

JOHN CRUZ, et al.,

Defendants.

On January 5, 2006, this Court entered a Decision and Order adopting Magistrate Judge Jonathan W. Feldman's Report and Recommendation, and denied defendant's motion to dismiss. Familiarity with this Court's Decision and Order and Magistrate Judge Feldman's Report and Recommendation is presumed. On January 10, 2006, defendant filed a notice of appeal from this Court's January 5, 2006 decision and order.

Although, generally, the filing of a notice of appeal divests the district court of jurisdiction, that is not the case when the appeal is brought without jurisdiction or is frivolous. In this case, it appears that the Second Circuit lacks jurisdiction to consider the appeal because it relates to a interlocutory order and is not a final one. Therefore, the appeal is frivolous for that reason and also because the appeal deals with an issue recently decided by the Second Circuit contrary to defendant's position. The order appealed from is clearly not a final order but an interlocutory one, and it is not


one of those collateral matters from which an appeal may be immediately taken. The Government's pending motion to proceed (Dkt. #298) sets forth ample authority, at pp. 4-9, justifying the continued prosecution of this action before the district court in spite of defendant's filing of a notice of appeal from the Court's interlocutory order of January 6, 2006.

I find defendant's purported appeal from my decision and order to be barred as jurisdictionally defective since the order appealed from is not a final order. I find that the appeal is frivolous on both jurisdictional and substantive grounds.

CONCLUSION

The Government's motion to proceed (Dkt. #298) before the district court, in spite of defendant's filing of a notice of appeal, is granted. The parties are directed to promptly proceed to complete all necessary pretrial matters so that the case can be disposed of or set for trial.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
March 6, 2006.